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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966

No. 95

RUTH ELIZABETH CHAPMAN and THOMAS LEROY TEALE,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONERS' REPLY BRIEF

Come now Ruth Elizabeth Chapman and Thomas LeRoy Teale and in answer to the respondent's brief set forth as follows:

This Court has never held that the violation of a *constitutional right* can be saved by the application of the "harmless error" rule, statute, practice, or State constitutional provision.[1]

Payne v. *Arkansas,* 356 US 560, 2 L.ed.2d 975;
Spano v. *New York,* 360 US 315, 3 L.ed.2d 1265;

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[1] California's constitutional provision is known as Article 4½, Section 6, California Constitution. California also has a constitutional provision against self-incrimination, Article 1, Section 13.

Lynumn v. *Illinois*, 362 US 528, 9 L.ed.2d 922;
Haynes v. *Washington*, 373 US 503, 10 L.ed.2d 513;
Miranda v. *Arizona*, 16 L.ed.2d 694;
Vignera v. *New York*, 16 L.ed.2d 694;
Westover v. *United States*, 16 L.ed.2d 694;
California v. *Stewart*, 16 L.ed.2d 694;
Fahy v. *Connecticut*, 375 US 85, 11 L.ed.2d 171.

This Court has adhered to an unbroken line of decisions which preclude the application of the harmless error rule to the improper admission of statements taken in violation of the constitutional guarantee and privilege against self-incrimination.

Fifth Amendment, United States Constitution;
Fourteenth Amendment, United States Constitution;
Griffin v. *California*, 380 US 609, 14 L.ed.2d 106.

In *Payne* v. *Arkansas*, 356 US 560, 2 L.ed.2d 975, the Court said:

> "Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.

"The amended facts, set out above, make applicable the conclusion reached in Chambers v. Florida, 309 US 227, 241, 84 L.ed. 716, 60 S.Ct. 472: 'Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death.' The judgment must be reversed because of the admission in evidence of the coerced confession. . . .

"The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

In *Spano* v. *New York*, 360 US 315, 3 L.ed.2d 1265, at 1272, this Court said:

"The State suggests, however, that we are not free to reverse this conviction, since there is sufficient other evidence in the record from which the jury might have found guilt, relying on Stein v. New York, 346 US 156, 97 L.ed. 1522, 73 S.Ct. 1077. But Payne v. Arkansas, 356 US 560, 568, 2 L.ed.2d 975, 981, 78 S.Ct. 844, authoritatively establishes that Stein did not hold that a conviction may be sustained on the basis of other evidence if a confession found to be involuntary by this Court was used, even though limiting instructions were given. Stein held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it. The judgment must be

"Reversed."

In *Lynumn* v. *Illinois*, 372 US 528, 9 L.ed.2d 922, at 928, the Court said:

"While this statement is not free from ambiguity, we take it to express the view that even if the testimony as to the petitioner's confession was erroneously admitted, the error *was a harmless one* in the light of other evidence of the petitioner's guilt. That is an impermissible doctrine. As was said in Payne v. Arkansas, 'this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.' 356 US 560, at 568, 2 L.ed.2d 975, 981, 78 S.Ct. 844. See Spano v. New York, 360 US 315, 324, 3 L.ed.2d 1265, 1272, 79 S.Ct. 1202; Watts v. Indiana, 338 U.S. 49, 50, note 2, 93 L.ed. 1801, 1804, 69 S.Ct. 1347; Haley v. Ohio, 332 U.S. 596, 599, 92 L.ed. 224, 228, 68 S.Ct. 302.

"The judgment is set aside, and the case is remanded to the Supreme Court of Illinois for further proceedings not inconsistent with this opinion." (Emphasis added.)

In *Haynes* v. *Washington*, 373 US 503, 10 L.ed.2d 513 at 524, the Court said:

"Of course, we neither express nor suggest a view with regard to the ultimate guilt or innocence of the petitioner here; that is for a jury to decide on a new trial free of constitutional infirmity, which the State is at liberty to order.

"This case illustrates a particular facet of police utilization of improper methods. While history amply

shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence, the coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a conviction. The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public. The claim, so often made in the context of coerced confession cases, that the devices employed by the authorities were requisite to solution of the crime and successful prosecution of the guilty party cannot here be made.

"Official overzealousness of the type which vitiates the petitioner's conviction below has only deleterious effects. . . . "

The effort to have an appellate court justify and declare as fair what the trial court and the prosecutors did foully does not comport with due process of law. Due process, in cases where a jury trial is authorized by the Constitution and statutes, requires guilt or innocence to be established before a jury "free of constitutional infirmity".

Haynes v. *Washington*, 373 US 503, 10 L.ed.2d 513.

This Court stated in *Bram* v. *United States*, 168 US 532, 42 L.ed. 569, re impermissible evidence:

"If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequence of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was *not prejudicial* because it did not tend to prove guilt." (Emphasis added.)

In *Miller* v. *Territory of Oklahoma,* 149 Fed. 330, the court said:

"The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that it is not apparent it in anywise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, *it was harmless.* As the appellate court has not insight into the deliberations of the jury-room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty." (Emphasis added.)

See also:

People v. *Glass*, 158 Cal. 650, at 659.

The trial of the two defendants together was highly prejudicial.

People v. *Aranda*, 63 Cal.2d 518.

In the *Aranda* case, the court said:

> "To some judges, however, the procedure (joint trials) cannot be justified. It results in serious impairment of the rights of the accused to a fair consideration by an impartial jury of the competent evidence produced against him.' (People v. Fisher, 249 N.Y. 419, 428 [164 N.E. 336, 339] [Lehman, J., dissenting]; see People v. Buckminster, 274 Ill. 435, 446-448 [113 N.E. 713, 715-716]; United States v. Delli Paoli (2d Cir.) 229 F.2d 319, 322 [Frank, J., dissenting].) It is a 'fiction' and a 'naive assumption' about the way juries can function. (See Krulewitch v. United States, 336 US 440, 453 [69 S.Ct. 716, 93 L.Ed. 790] [Jackson, J., concurring]; People v. Chambers, 231 Cal.App.2d 23, 33 [41 Cal.Rptr. 551].) The rule calls upon the jury to perform 'a mental gymnastic which is beyond, not only their powers, but anybody's else,' (Nash v. United States (2d Cir.) 54 F.2d 1006, 1007; see Meltzer, Involuntary Confessions: The Allocation of Responsibility between Judge and Jury, 21 U.Chi.L.Rev. (1954) 317, 326.) Writing for the four dissenters in Delli Paoli v. United States, 352 US 232 [77 S.Ct. 294, 1 L.Ed. 2d 278], Justice Frankfurter stated: 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such

a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (P. 247.) To these critics, the rule is not basic to our jury system and is not needed to preserve the system. Instead it is a rule that perverts the jury trial since it calls upon ordinary lay people to obey an instruction that every judge realizes cannot be obeyed. It fosters what one scholar refers to as our 'inconsistent attitude' toward juries. We treat them 'at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.' (Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) p. 105.)

"Whether or not these criticisms of the present rule require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is rendered harmless to the nonconfessing defendant by an instruction that it should not be considered against him. At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them. When, however, the confession implicating both defendants is not admissible at all, there

is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. (People v. Gonzales, 136 Cal. 666, 668-669 [69 P. 487]; see Greenwell v. United States (D.C. Cir.) 336 F.2d 962, 968-969; People v. Donovan, 13 N.Y.2d 148, 151 [243 N.Y.S. 2d 841, 193 N.E.2d 628]; People v. Waterman, 9 N.Y.2d 561, 567 [216 N.Y.S. 2d 70, 175 N.E.2d 445]; compare People v. Rudish, 294 N.Y. 500 [63 N.E.2d 77] with Malinski v. New York, 324 US 401, 410-412 [65 S.Ct. 781, 89 L.Ed. 1029].). . . . (63 Cal.2d at 525-526)

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"It is contended that it is a denial of due process to admit into evidence at a joint trial the confession of one defendant inculpating a codefendant even though the jury is instructed that the confession is not to be considered against the codefendant. In Jackson v. Denno, 378 US 368 [84 S.Ct. 1774, 12 L.Ed.2d 908, 1 ALR 3d 1205], the United States Supreme Court held that a defendant was constitutionally entitled to have a trial judge or possibly a separate jury determine that his confession was voluntary before it was submitted to the trial jury for an assessment of its credibility. The court did not believe that a jury could separate the issue of the voluntariness of an extrajudicial statement from the issue of its truth. 'If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest

by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession.

"'It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course it took, was affected by other evidence showing the confession was true.' (Pp. 388-389.) It quoted from Justice Frankfurter's dissent in Delli Paoli to the effect that a jury should not be permitted to be influenced by evidence against a defendant that as a matter of law they cannot consider but as a matter of fact they cannot disregard, and cited Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) pages 104-105, to the same effect.

"Although Jackson was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.'

"[1] 'Because of these close parallels between Jackson and Delli Paoli, Jackson may foreshadow a holding that the Delli Paoli procedure violates due process.' (78 Harv. L. Rev. 211, 213; see People v. Clark, 62 Cal.2d 870, 885, fn. 13 [44 Cal. Rptr. 784, 402 P.2d 856].)'"

"Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which Jackson held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In Joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' (People v. Chambers, 231 Cal.App.2d 23, 33 [41 Cal.Rptr. 551].) It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." (63 Cal.2d 528-529)

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"'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to mend.' (United States v. Delli Paoli (2d Cir.) 229 F.2d 319, 323 [Frank, J., dissenting].) In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098." (63 Cal.2d 530)

Actually, the defenses were in complete conflict in that Mr. Teale refused to admit, even to his counsel, any participation in the crimes, whereas Mrs. Chapman admitted to the officers and doctors that she was with Mr. Teale when he committed the crimes but did not voluntarily participate therein. The case is actually very weak against Mrs. Chapman and there was a serious dispute as to her ability to have a specific intent at the time of the crime.

The Error Was Not Harmless Where the Evidence of Mrs. Chapman's Guilt Was Based Solely on Inferences and Comment of the Prosecutor as to the Silence of the Defendants Was Used to Supplant Evidence.

Respondent states: "Although the present case was a circumstantial evidence one, the evidence of the guilt of Petitioners was overwhelming." (Resp. Brief, p. 25).

However, in analyzing the evidence presented against Mrs. Chapman, it is clear that the evidence was so insufficient that any error was prejudicial, particularly the comments of the prosecutor and the court's instructions.

The jury should consider the case against each defendant separately and only consider the evidence *admitted against a particular defendant* in determining that defendant's guilt on each charge. Also, that evidence admitted only against one defendant could not be considered against the other defendant. Despite this fact, the Attorney General in its Respondent's Brief and the California Supreme Court in its Opinion linked all the evidence admitted against either defendant in an attempt to establish the corpus delicti of the *crimes of robbery, kidnaping and murder.* This was buttressed by comment and argument regarding

the failure of defendants to testify. Eliminating all evidence that had been admitted into evidence only against the codefendant Teale and the illegal comment, it is impossible for the respondent to search the record and show even the corpus delicti of any of the alleged crimes as against Mrs. Chapman—let alone to show that the evidence was so "overwhelming" that any error against her would not be prejudicial.

None of These Elements Was Proved Regarding Mrs. Chapman:

A. ROBBERY is defined in the California Penal Code, Section 211, as follows:

> "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

Mrs. Chapman was convicted of robbery that was alleged to have taken place in San Joaquin County. (See Count One of indictment) The only evidence on this phase of the case was the testimony of witness Lawrence Niland, the owner of the Spot Club. (R.T. 971) He testified that he went to the Spot Club about nine o'clock on the morning of October 18, 1962 (R.T. 984); that he observed a cash drawer on top of the bar when he entered. (R.T. 985) However, the safe was unlocked with around four hundred dollars in it. (R.T. 986) He testified that from his examination of the tape he determined that he was short about $260. (R.T. 998)

These are the circumstances that the prosecution relied upon to draw the *inference* that the $260 was taken from the

person or immediate presence of Billy Dean Adcock, against his will, and by means of force or fear.

The evidence is insufficient as a matter of law to show any participation by Mrs. Chapman in the taking of the $260 from the decedent, "accomplished by means of force or fear". With nothing but an inference that the money had been taken from the establishment by means of force and fear, and second, the inference that Mrs. Chapman participated in said taking, the trial court instructed the jury that because Mrs. Chapman failed to testify "That among the inferences that may reasonably be drawn therefrom, those unfavorable to the Defendant are the more probable". (R.T. 2163)

B. KIDNAPING. The crime of kidnaping, under California law, is the *forcible* abduction of another person. (Penal Code, Section 207) The evidence in the case before the bar is totally devoid of any evidence of a *forcible* abduction. The only evidence of the circumstances under which the victim left the bar was the testimony of witness Montalvo. (R.T. 884-894) He testified as follows:

> "Well, I was coming by and slowing down for the light, I looked over to the—to the Spot Club and there was three—three persons there, and the bartender—the big fellow, the bartender, he was—looked like he was closing the door, and there was a fellow behind him and a woman was walking away about six feet away, and that's all I seen. I just—when the light changed, I kept on going." (R.T. 887)

This witness further testified that the bartender appeared to be locking the door (R.T. 888) and that he would not recognize the man or woman with the bartender. (R.T. 891)

No other evidence was presented to explain the circumstances under which the alleged victim left the Spot Club. Obviously, the relevance of the above testimony was for the jury to draw an *inference* of kidnaping by the defendants.

Again, there is nothing but an inference based upon an inference against Mrs. Chapman. First, from the above evidence, an inference must be made that there was a *forcible* abduction. (California Penal Code, Section 207) Second, the inference that Mrs. Chapman participated in said forcible abduction. And then there was the prejudicial argument of the prosecutor and the court's instructions.

C. MURDER OF THE FIRST DEGREE. The victim (Billy Dean Adcock) was found dead in Sacramento County. (R.T. 922) He had last been seen alive at the Spot Club in San Joaquin County. (R.T. 887) The defendants had been acquitted of the charge of kidnaping Mr. Adcock for the purpose of robbery (the original charge) by their finding of guilty on the included offense of simple kidnaping. Thus we have a homicide in a different county than the robbery charge that defendants were convicted of, under unexplained circumstances. Again, nothing but speculation and inferences can connect Mrs. Chapman with this crime or the specific intent that was an element of the corpus delicti of first degree murder. Thus, the continual demand by the prosecution that the jury draw an adverse inference against Mrs. Chapman because of her failure to testify, and the trial court's instruction to the same effect, was highly prejudicial.

Respondent stated:

> "What evidence disputed the case presented by the prosecution which demonstrated the guilt of the Peti-

tioners beyond a reasonable doubt? There was none. This was not a case in which the facts were sharply disputed." (Respondent's Brief, pp. 38-39)

This statement reflects the respondent's continuous efforts to condemn the petitioners jointly rather than individually and overlook the fact that on January 29, 1963, the Public Defender presented a motion to withdraw as counsel for petitioner Chapman on the grounds of a *conflict of interest* between her and petitioner Teale, which was granted. (C.T. 4, 7A, 8A)

No percipient witness testified to any active or actual participation by Ruth Elizabeth Chapman to the crimes of robbery, kidnaping or murder. It was an essential part of the corpus delicti of the crime alleged against Mrs. Chapman that any acts or participation of hers be done with a particular or specific intent. No direct or circumstantial evidence was introduced to base a finding of a particular or specific intent of Mrs. Chapman at the time of the crimes in question. *Both* prosecution and defense experts agreed that following the crimes in question, Mrs. Chapman had suffered amnesia. (R.T. 1579; 1780) With this state of the record, it is manifest that *any error* would be prejudicial. Mrs. Chapman's state of mind at the time of the alleged crimes could only be determined by the jury by *inferences*. With the role of an inference thus playing such a vital part in the decision, the court then instructed the jury from her failure to testify "that among the *inferences* that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." (Emphasis added) (R.T. 2163) This instruction directly violated the constitutional rule of *Griffin* v. *California*, 380 US 609, under circumstances that cannot be held harmless.

The respondent's statement that there was no evidence presented that disputed the case presented by the prosecution is untrue as to Mrs. Chapman. There was a sharp dispute concerning her defense of lack of ability to have a specific intent.

Dr. Arnold Sheuerman, a psychiatrist, had testified on behalf of Mrs. Chapman that in his opinion Mrs. Chapman had an amnesic episode that occurred after she received a beating from the codefendant Teale, and *before* any of the crimes in question. (R.T. 1657-1658)

Dr. Ralph K. Winkler, a psychiatrist, testifying for the prosecution, agreed that Mrs. Chapman suffered an amnesic episode but gave his opinion that it occurred *after* the crimes in question and thus she was capable of forming a specific criminal intent. (R.T. 1771)

The question concerning Mrs. Chapman's ability to form a criminal intent had to hinge on when the amnesia occurred, which amnesia both the State and defense established *had occurred.*

Here there was nothing but an *inference* that Mrs. Chapman, because she was with the codefendant, participated in the alleged crimes. What other proof is there of her state of mind at the time of the acts in question? Immediately prior to the crimes, the last two witnesses who saw Mrs. Chapman stated that she was intoxicated, appeared to have been crying, and couldn't coordinate when she attempted to dance. (R.T. 854; 855; 861; 862; 868; 874; 875)

The court then instructed the jury that because Mrs. Chapman failed to testify, "that among the inferences that may reasonably be drawn therefrom, those *unfavorable* to

the defendant are the more probable." (Emphasis added) (R.T. 2163)

This instruction went to the very heart of Mrs. Chapman's defense of inability to form a criminal intent and was exceedingly harmful.

If we were to paraphrase the language of Justice Field in *Wilson* v. *United States,* 149 US 60, 70, substituting in the place of the words "this statute" the words "the rule of *Griffin* v. *California*", it would be stated as follows:

> "We do not see how the rule of Griffin v. California can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded as good ground for a new trial in all cases where the proof of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause."

The proof of guilt of Mrs. Chapman is not so clear and conclusive that the court can say affirmatively that she could not have been harmed by the multitudinous comments of the prosecuting attorneys on her failure to testify, plus the trial court's erroneous instruction that unfavorable inferences could be drawn by the jury from her failure to testify to facts within her knowledge.

In *Stewart* v. *United States,* 366 US 1, at the defendant's third trial the defendant testified for the first time and was asked on cross-examination, "This is the first time you have gone on the stand, isn't it?" On certiorari, the Supreme Court of the United States reversed the conviction, holding (1) the question was improper and (2) prejudicial

rather than harmless error resulted from the asking of the question.

The Record Supports Fact That Mrs. Chapman Failed to Testify Because of Her Physical Condition, in Addition to Her Constitutional Right to Remain Absolutely Silent Without That Silence Being Used as Evidence Against Her.

Respondent has stated:

> "Any attempt by Petitioners to cast the blame as to Petitioner Chapman not taking the stand because of her nervous condition on the delay in the trial is certainly not supported by the record." (Respondent's Brief, p. 35)

On the contrary, the record shows that Mrs. Chapman made every possible effort to be granted a speedy (and separate) trial but was denied such constitutional right for the sole purpose of forcing and having a joint trial with her codefendant. (For history of said effort by Mrs. Chapman, see Appendix A hereof)

Mrs. Chapman's trial was delayed until five months and twenty-one days after her arrest for the sole purpose of having a joint trial with her codefendant. Her motion for a separate trial was denied, as were her motions for a speedy trial and motion to dismiss on grounds of unconstitutional delay. At none of these motions did the prosecution urge any cause other than its asserted right to proceed against both defendants jointly. (R.T. 104A) The prosecution offered no factual reason why such a joint trial was either necessary or convenient.

The delay was prejudicial to Mrs. Chapman because it contributed to her collapse and inability to testify, which failure to testify was commented on extensively. In this regard, Mrs. Chapman submitted an affidavit in support of her demand for immediate trial that stated:

> "That I have previously suffered from a nervous breakdown and am presently in a very nervous condition; that I have been under arrest and confined continuously for a period of 158 days. *That I believe that a further delay in my trial will be detrimental to my health and may well result in my having a relapse from my previous breakdown.*
>
> "Wherefore, the undersigned respectfully demands that this court issue its order for an immediate trial for this defendant, or, in the alternative, that Information No. 15779 be dismissed as to this defendant.
>
> "Dated: March 28th, 1963.
>
> "/s/ Ruth Elizabeth Chapman
> "Affiant" (Emphasis added)
> (C.T. 86-87)

Although Mrs. Chapman was in jail and subject to examination by the prosecution's doctors, no counter affidavit was filed. The motion for immediate trial, or, in the alternative, motion to dismiss for failure to bring case to trial was denied. (C.T. 93) Thus, both the prosecution and trial court had knowledge of Mrs. Chapman's physical condition and that further delays in her trial would prejudice her ability to aid in her defense. Mrs. Chapman stated in her affidavit (two months prior to the start of trial) "That this defendant intends to testify at her trial". (C.T.

31) The probation report, in giving Mrs. Chapman's version, stated:

> "She expressed the feeling that if her emotional collapse and the need of tranquilizers had not interfered with her taking the stand and giving the foregoing versions, the verdict might have been different as to her." (C.T. 329)

The collapse that the probation report referred to occurred twenty-two days after the trial commenced. (R.T. 1733) This was eighty-two days after her affidavit stating she intended to testify at her trial and 194 days after her arrest.

With full knowledge by the trial court and the prosecution of the foregoing facts, as distinguished from the jury, who did not have such knowledge, the prosecution then stated and re-stated to the jury that they *should* draw adverse inferences against Mrs. Chapman because she didn't testify but could have.

> "Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom *will be* an adverse inference under the circumstances, and under the instructions of the Court." (Emphasis added) (R.T. 1827)

The record supports the fact that Mrs. Chapman resisted delays in her trial and informed the court that such delays would be detrimental to her health. The trial was delayed several months and Mrs. Chapman did collapse

during the trial. The prejudice of the delay was compounded by the prosecution, who was responsible for the delays, in then arguing vehemently about Mrs. Chapman not taking the stand.

> " . . . you have heard much about lawyers being referred to as 'mouthpieces' . . . I think you have seen a demonstration here . . . because this is a demonstration where actually Ruth Elizabeth Chapman is speaking through Mr. Johnson, a 'mouthpiece.'" (R.T. 2109)

The Prejudice to Mr. Teale of a Joint Trial, and His Silence as "Evidence."

Mr. Teale was likewise prejudiced by the testimony with reference to Mrs. Chapman and her alleged admissions that she was with Teale when he allegedly committed the crimes. His silence, commented upon as proof of guilt, necessarily weighed heavily against him and was highly prejudicial "silent evidence" in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

> *Griffin* v. *California*, 380 US 609;
> *Malloy* v. *Hogan*, 378 US 1.

Evidence of prejudice to Mr. Teale is the reading of the statements of Ruth Chapman to Dr. Arnold Sheuerman:

> "'It was such a shock when Tommy beat me up.' Now, he says, 'Then she went on to describe how they had driven from Croce's a short way, she doesn't know how long, he had told her to stop, that we'll go in and get a beer. She tried to resist because of her appearance, of her fatigue, of her intoxication. He insisted.

"I did what I was told." He went in the bar, he ordered two beers, she was quite upset, he insisted, and then he said, "I love you very much," and she said to me in the examination, "I melted. I was so loaded I could hardly stand up. Besides, I was beat up, he wanted to dance, I tried to, I was afraid to provoke him. There were two other couples in the bar. They left." She looked in her purse—there is some question about whether or not this was her purse—there is some question about whether or not this was her purse or not or a mistaken purse—she looked for a cigarette, and heard the comment, "Get your hands up," looked up, saw a gun in Mr. Teale's hand, just stood there, he told her to lock the door, she went over to do it, couldn't find the lock.' Now, ladies and gentlemen, that corridor is thirty feet long. Nobody in the world except these two persons are able to say what had happened in there. Why should she say that she had gone clear to that door at his command to try to lock it? Why should she try to put herself in that position, unless she is trying to cooperate and tell the truth. Because of the very comment the doctor made, 'I asked her at that point'—and she is the one that is telling it, telling the good with the bad, everything that she can to him —'I asked her at that point why she didn't go out of the door, why she didn't get out, and she said, "I don't know, I couldn't think, it was just like I was in a trance or a nightmare."'" (R.T. 2040-2041)

The jury again asked to have Dr. Sheuerman's testimony read. (R.T. 2182, et seq.)

Where There Is a Violation of the Rule of Griffin v. California, 380 US 609, Can the Error Be Held to Be Harmless?

On April 28, 1965, *Griffin* v. *California* held that the Fifth Amendment "in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence . . . " (380 US at 615, 14 L.ed.2d at 110)

The question is now asked: "Where there is a violation of the rule of *Griffin* v. *California,* can the error be held to be harmless?" To answer this question, we must look to the purposes of the *Griffin* rule.

> " . . . the 'purpose' of the Griffin rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents, values described in the Malloy case as reflecting 'recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . ' "
>
> " . . . the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather *to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'* " (*Tehan* v. *Shott,* 15 L.ed.2d 458-459) (Emphasis added)

Thus, if "even the guilty are not to be convicted unless the prosecution shoulder the entire load", it follows that a violation of this basic purpose cannot be held to be harmless. The application of the *Griffin* rule should be the

same as the application of the rule governing involuntary confessions.

> "Without regard for the truth or falsity of a confession, and *even though there is ample evidence aside from the confession to support conviction,* a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession." (*Jackson* v. *Denno,* 378 US 368, 12 L.ed.2d 908, headnote 3) (Emphasis added)
>
> "Due process, guaranteed by the Fourteenth Amendment, is denied an accused where he is deprived of that fundamental fairness which is essential to the very concept of Justice." (*Payne* v. *Arkansas,* 356 US 560, 2 L.ed.2d 975, headnote 7)

Rogers v. *Richmond,* 365 US 534, 5 L.ed.2d 760, states:

> "The constitutional principle of excluding involuntary confessions does not rest upon their nature as untrustworthy, but upon the principle that the state must establish guilt by evidence independently and freely secured, and may not by coercion prove its charge against an accused out of his own mouth." (Headnote 3)
>
> "A defendant in a state criminal trial has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment." (Headnote 7)

It is further stated in *Rogers* v. *Richmond,* 5 L.ed.2d 760, at 769:

"To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension."

To the extent that in the trial of petitioners, argument and instructions were given the jury on the basis of standards that departed from constitutional requirements, to that extent petitioners were unconstitutionally tried and their convictions should be vitiated by error of constitutional dimension.

Mr. Justice Harlan, in *Twining* v. *New Jersey*, 211 US at 121, 53 L.ed. at 115, said:

"By the Fifth Amendment, as already stated, it was expressly declared that no one should be compelled, in a criminal case, to be a witness against himself. Those Amendments being adopted by the nation, the people no longer feared that the United States or any Federal agency could exert power that was inconsistent with the fundamental rights recognized in those Amendments. It is to be observed that the Amendments introduced no principle not already familiar to liberty-loving people. They only put in the form of constitutional sanction, as barriers against oppression, the principles which the people of the colonies, with entire unanimity, deemed vital to their safety and freedom. • • •

"It is my opinion, also, that the right to immunity from self-incrimination cannot be taken away by any state consistently with the clause of the Fourteenth

Amendment that relates to the deprivation by the state of life or liberty without due process of law." (53 L.ed. at 117)

Mr. Justice Harlan pointed out that the view is supported by what Mr. Justice Miller said for the court in *Davidson* v. *New Orleans,* 96 US 97, 101, 102, 24 L.ed. 616, 618, 619, in which the guarantees of personal rights included "protection 'against the accused being compelled, in a criminal case, to testify against himself.'"

In *Malloy* v. *Hogan,* 378 US 1, 12 L.ed.2d 653, the court states:

"The marked shift to the federal standard in state cases began with Lisenba v. California, 314 US 219, 86 L.ed. 166, 62 S.Ct. 280, where the Court spoke of the accused's 'free choice to admit, to deny, or *to refuse to answer.*' Id., at 241, 86 L.ed. at 182. See Ashcraft v. Tennessee, 322 US 143, 88 L.ed. 1192, 64 S.Ct. 921; Malinski v. New York, 324 US 401, 89 L.ed. 1029, 65 S.Ct. 781; Spano v. New York, 360 US 315, 3 L.ed.2d 1265; Lynumn v. Illinois, 372 US 528, 9 L.ed.2d 922, 83 S.Ct. 917; Haynes v. Washington, 373 US 503, 10 L.ed.2d 513, 83 S.Ct. 1336. The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. Rogers v. Richmond, 365 US 534, 541, 5 L.ed.2d 760, 766, 81 S.Ct. 735. Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment pro-

hibits the States from inducing a person to confess through 'sympathy falsely aroused,' Spano v. New York, supra, 360 US at 323, 3 L.ed.2d at 1272, or other like inducement far short of 'compulsion by torture,' Haynes v. Washington, supra, it follows a fortiori that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement —the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining, for such silence."

The Court stated in *Murphy* v. *Waterfront Commission of New York*, 378 US 52, 12 L.ed.2d 678, at 681:

"It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev, 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' United States

v. Grunewald, 233 F.2d 556, 581, 582 (Frank, J., dissenting), revd 353 US 391, 1 L.ed. 2d 931, 77 S.Ct. 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' Quinn v. United States, 349 US 155, 162, 99 L.ed. 964, 972, 75 S.Ct. 668, 51 ALR 2d 1157.

"Most, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each."

The State of California is not willing to accept the plain wording of the Fifth and Fourteenth Amendments. They would add words not in the Constitution, to-wit: "if not prejudicial". But the Fifth and Fourteenth Amendments forbid any use of self-incriminating evidence—*Nemo tenetur seipsum accusare,* no one is bound to accuse himself.

WHEREFORE, petitioners pray for reversal of the judgments below.

Respectfully submitted,

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